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No. 82–110

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRED J. GLUSMAN and
INTERNATIONAL DRESS SHOP, INC.,
Appellants,

v.

STATE OF NEVADA; STATE OF NEVADA GAMING COMMISSION; and STATE OF NEVADA GAMING CONTROL BOARD,
Appellees.

On Appeal From the Supreme Court of Nevada

MOTION TO DISMISS OR AFFIRM

BRIAN McKAY
Attorney General of
the State of Nevada

BY: NIKOLAS L. MASTRANGELO
Deputy Attorney General
Gaming Division
Building D, Suite 880
4220 South Maryland Parkway
Las Vegas, Nevada 89158
Telephone: (702) 731-3150
Counsel for Appellees

Date: January 24, 1983

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No. 82-110

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

FRED J. GLUSMAN and
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Appellants,

v.

STATE OF NEVADA; STATE OF NEVADA GAMING COMMISSION; and STATE OF NEVADA GAMING CONTROL BOARD,

Appellees.

On Appeal From the Supreme Court of Nevada

MOTION TO DISMISS OR AFFIRM

Appellees, the State of Nevada; State of Nevada Gaming Commission; and State of Nevada Gaming Control Board, respectfully move to dismiss the appeal herein or in the alternative, to affirm the opinion of the Nevada Supreme Court on the grounds that the proceedings appealed from lack finality, and that the issues

raised by the appellants do not present a substantial federal question. Rule 16(1)(a), (b) and (d).

QUESTIONS PRESENTED BY THIS MOTION

1. Should the Court consider the instant challenge to Nevada's statutory standards for a gaming license or finding of suitability when subsequent to the filing of the notice of appeal to this Court, the appellant filed his application for a finding of suitability with the State Gaming Control Board, and a decision on this application has not yet been made?

2. Does the challenge to Nevada's statutory and regulatory standards which will be used to determine Glusman's ability to do business on the premises of licensed gaming establishments fail to present a substantial federal question?

OPINION BELOW

The opinion of the Nevada Supreme Court from which the instant appeal has been taken is reported at 651 P.2d 639.

PROVISIONS OF STATE LAW INVOLVED

NRS 463.0129 (formerly NRS 463.130):

1. The legislature hereby finds, and declares to be the public policy of this state, that:

(a) The gaming industry is vitally important to the economy of the state and the general welfare of the inhabitants.

(b) The continued growth and success of the gaming industry is dependent upon public confidence and trust that licensed gaming is conducted honestly and competitively and that the gaming industry is free from criminal and corruptive elements.

(c) Public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments and the manufacture or distribution of gambling devices and equipment.

(d) All establishments where gaming is conducted and where gambling devices are operated, and manufacturers, sellers and distributors of certain gambling devices and equipment in the state shall therefore be licensed, controlled and assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants of the state, to foster the stability and success of the gaming industry and to preserve the competitive economy and policies of free competition of the State of Nevada.

2. No applicant for a license or other affirmative commission approval has any right to a license or the granting of the approval

sought. Any license issued or other commission approval granted pursuant to the provisions of this chapter or chapter 464 of NRS is a revocable privilege, and no holder acquires any vested right therein or thereunder.

NRS 463.167(2) and (3) (formerly NRS 463.160(8)):

2. If the premises of a licensed gaming establishment are directly or indirectly owned or under the control of the licensee therein, or of any person controlling, controlled by, or under common control with the licensee, the commission may, upon recommendation of the board, require the application of any person for a determination of suitability to be associated with a gaming enterprise if the person:

(a) Does business on the premises of the licensed gaming establishment;

(b) Does business with the licensed gaming establishment as a junket representative or ticket purveyor; or

(c) Provides any goods or services to the licensed gaming establishment for a compensation which the board finds to be grossly disproportionate to the value of the goods or services.

3. If the commission determines that the person is unsuitable to be associated with a gaming enterprise, the association must be terminated. Any agreement which entitles a business other than gaming to be conducted on the premises, or entitles a person other than gaming to conduct business with the licensed gaming establishment as set forth in

paragraph (b) or (c) of subsection 2, is subject to termination upon a finding of unsuitability of the person associated therewith. Every such agreement must be deemed to include a provision for its termination without liability on the part of the licensee upon a finding by the commission that the person associated therewith is unsuitable to be associated with a gaming enterprise. Failure expressly to include that condition in the agreement is not a defense in any action brought pursuant to this section to terminate the agreement. If the application is not presented to the board within 30 days following demand or the unsuitable association is not terminated, the commission may pursue any remedy or combination of remedies provided in this chapter.

NRS 463.1405:

1. The board shall investigate the qualifications of each applicant under this chapter before any license is issued or any registration, finding of suitability or approval of acts or transactions for which commission approval is required or permission is granted, and shall continue to observe the conduct of all licensees and other persons having a material involvement directly or indirectly with a licensed gaming operation or registered holding company to ensure that licenses are not issued or held by, nor is there any material involvement directly or indirectly with a licensed gaming operation or registered holding company by unqualified, disqualified or unsuitable persons, or persons whose operations are conducted in an unsuitable manner or in unsuitable or prohibited places or locations.

2. The board has full and absolute power and authority to recommend the denial of any

application, the limitation, conditioning or restriction of any license, registration, finding of suitability or approval, the suspension or revocation of any license, registration, finding of suitability or approval or the imposition of a fine upon any person licensed, registered, found suitable or approved for any cause deemed reasonable by the board.

3. The commission has full and abolute [sic] power and authority to deny any application or limit, condition, restrict, revoke or suspend any license, registration, finding of suitability or approval, or fine any person licensed, registered, found suitable or approved, for any cause deemed reasonable by the commission.

NRS 463.170(1)-(4):

1. Any person who the commission determines is qualified to receive a license or be found suitable under the provisions of this chapter, having due consideration for the proper protection of the health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada and the declared policy of this state, may be issued a state gaming license or found suitable. The burden of proving his qualification to receive any license or be found suitable is on the applicant.

2. An application to receive a license or be found suitable shall not be granted unless the commission is satisfied that the applicant is:

(a) A person of good character, honesty and integrity;

(b) A person whose prior activities, criminal record, if any, reputation, habits and associations do not pose a threat to the public interest of this state or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair or illegal practices, methods and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto; and

(c) In all other respects qualified to be licensed or found suitable consistently with the declared policy of the state.

3. A license to operate a gaming establishment shall not be granted unless the applicant has satisfied the commission that:

(a) He has adequate business probity, competence and experience, in gaming or generally; and

(b) The proposed financing of the entire operation is:

(1) Adequate for the nature of the proposed operation; and

(2) From a suitable source.

Any lender or other source of money or credit which the commission finds does not meet the standards set forth in subsection 2 may be deemed unsuitable.

4. An application to receive a license or be found suitable constitutes a request for a determination of the applicant's general character, integrity, and ability to participate or engage in, or be associated with gaming. Any written or oral statement made in the course of an official proceeding

of the board or commission by any member thereof or any witness testifying under oath which is relevant to the purpose of the proceeding is absolutely privileged and does not impose liability for defamation or constitute a ground for recovery in any civil action.

Regulation 3.080 of the Regulations of the Nevada Gaming Commission and State Gaming Control Board:

The commission may deny, revoke, suspend, limit, condition, or restrict any registration or finding of suitability or application therefor upon the same grounds as it may take such action with respect to licenses, licensees and licensing; without exclusion of any other grounds. The commission may take such action on the grounds that the registrant or person found suitable is associated with, or controls, or is controlled by, or is under common control with, an unsuitable person.

Regulation 3.090 of the Regulations of the Nevada Gaming Commission and State Gaming Control Board:

1. No license, registration, finding of suitability, or approval shall be granted unless and until the applicant has satisfied the commission that the applicant:

(a) Is a person of good character, honesty, and integrity;

(b) Is a person whose background, reputation and associations will not result

in adverse publicity for the State of Nevada and its gaming industry; and

(c) Has adequate business competence and experience for the role or position for which application is made.

2. No license, registration, finding of suitability, or approval shall be granted unless and until the applicant has satisfied the commission that the proposed funding of the entire operation shall be (a) adequate for the nature of the proposed operation, and (b) from a suitable source. The suitability of the source of funds shall be determined by the standards enumerated in paragraph 1(a), (b) and (c) above.

STATEMENT OF THE CASE

This case involves a decision by the State of Nevada to require appellant, Fred J. Glusman, to file an application for a finding of suitability to do business on the premises of licensed gaming establishments. Appellant Glusman is an officer, director and sole shareholder of appellant, International Dress Shop, Inc. through which he conducts said business.

The gaming laws of Nevada are administered by two agencies created by the Legislature, the Nevada Gaming Commission (hereinafter Commission) and the State Gaming Control Board

(hereinafter Board). These agencies are charged with enforcing the declared public policy of the State which requires "strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments . . . [and that] [a]ll establishments where gaming is conducted . . . be licensed, controlled and assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants of the state, ..." NRS 463.0129.

The Board is composed of three full-time members and employs a large staff of investigators, analysts, accountants and other experts to monitor and police, on a day-to-day basis, all gaming operations and establishments in the State. The Commission is a five-member body, also charged with administering the State's gaming laws, which meets at least monthly and in certain matters is responsible for acting upon recommendations of the Board. One such area is the decision of whether to require an investiga-

tion to determine the suitability of an individual who does business on premises where licensed gaming is conducted and if so, the ultimate determination on the issue of suitability. NRS 463.167(2) and (3) is an important tool of the Board and Commission in discharging their responsibility to police the gaming industry.[1]

On June 6, 1980, a letter was sent to appellant Glusman by the Board directing him to file an application for a determination of suitability within 30 days. In an effort to avoid filing said application, Glusman filed a complaint for declaratory relief in the State court which leveled a barrage of constitutional challenges to what is now NRS 463.167(2). Following the issuance of a formal order by the Commission, which again required Glusman to

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1. NRS 463.167(2) and (3) previously set forth on pages 4-5, is referred to in the opinion below and in the jurisdictional statement under its former designation, NRS 463.160(8).

file the aforementioned application, appellant obtained a preliminary injunction by the court which prohibited the Commission from enforcing its order until the issues raised in his complaint had been resolved.[2]

On February 27, 1981, the trial court issued findings of fact and conclusions of law, and a judgment upholding the constitutionality of NRS 463.167.[3] Appellants then appealed to the Nevada Supreme Court who, on September 30, 1982, affirmed the findings of the constitutionality of NRS 463.167 with the proviso that the costs of investigation could not constitutionally be imposed upon the appellant Glusman.

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2. Because of the paramount State interest in unhindered, effective gaming enforcement, the opinion of the Nevada Supreme Court held that the trial court was without jurisdiction to issue the preliminary injunction.

3. The constitutionality of NRS 463.170 which is challenged herein was never challenged or even mentioned in the trial court proceedings or in the appellants' opening brief to the Nevada Supreme Court.

On November 18, 1982, after filing a notice of appeal to this Court, and being denied a stay from this Court of the State administrative proceedings, Glusman filed his application for a determination of suitability as previously ordered by the Commission. An investigation of Glusman on said application is currently in progress and a determination thereon will be made upon completion of the investigation. Pending said determination, Glusman is permitted to continue operating his business on licensed gaming premises and if found suitable, will enjoy this privilege in the future.

SUMMARY OF ARGUMENT

Since the effect of the decision of the Nevada Supreme Court was to revest jurisdiction in the Board and Commission to conduct the investigation and determination of the suitability of Glusman which is currently in progress, the proceedings lack the requisite finality for review in this Court.

The appellants' vagueness challenge to the statutory and regulatory standards which will be applied to determine appellant Glusman's suitability to continue to operate his businesses on the premises of licensed gaming establishments, does not present a substantial federal question. The standards, in any event, are clearly sufficient to pass constitutional muster as economic regulation, and are not unconstitutionally vague.

ARGUMENT

I. POINT I.

The instant appeal is premature in that the administrative proceedings below lack finality and appellants have failed to exhaust their administrative remedies.

This Court has recognized that where state administrative proceedings have been interrupted by state courts only to be returned for administrative consideration of the significant issues, an appeal to the United States Supreme Court lacks requisite finality and is subject to

dismissal. Republic Natural Gas Co. v. State of Oklahoma, 334 U.S. 62 (1948). "This prerequisite for the exercise of the appellate powers of this Court is especially pertinent when a constitutional barrier is asserted against a State court's decision on matters peculiarly of local concern." Id. at 67. (Emphasis added.) It would be difficult to imagine a matter of more peculiarly local concern than that of gaming regulation to the State of Nevada. See, e.g., the concurring opinion of Judge Pope in Marshall v. Sawyer, 301 F.2d 639 (9th Cir. 1962).

The finality requirement is not only designed to avoid the evils of piecemeal review, but to spare the nation's highest court from reviewing cases which could be resolved by a decision favorable to the appellant below, and to avoid unnecessary interference in ongoing state proceedings. Republic Natural Gas Co. v. State of Oklahoma, supra; Costarelli v. Massachusetts, 421 U.S. 193 (1975).

In the instant case, since the ultimate issues in the administrative proceedings have yet to be determined regarding Glusman's ability to continue doing business on the premises of licensed gaming establishments, a determination favorable to Glusman may render his challenge herein moot.

In Republic, supra, this Court further declared that "the incurring of some loss, before a process preliminary to review here is exhausted, is not in itself sufficient to authorize our intervention." Id. at 70. In any event, the Nevada Supreme Court's opinion precludes the State from imposing the costs of its investigation on Glusman.

The oft quoted phrase from Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50 (1938), applies with equal force to the instant case: "No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

II. POINT II.

The instant appeal does not present a substantial federal question.

The statutory and regulatory standards which the appellants have challenged as unconstitutionally vague are those which will be used to determine whether appellant Glusman will be permitted to continue to do business on premises where licensed gambling is conducted. These provisions are not criminal in nature, nor do they impact upon conduct protected by the First Amendment. They constitute purely economic regulation designed to effectuate the compelling State interest in effective gaming control.[4]

Assuming arguendo, that appellants can demon-

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4. The opinion of the Nevada Supreme Court points out that the test for measuring such economic regulation against vagueness challenges, as recently reaffirmed by this Court, is much more relaxed than the test for criminal statutes or those that have an impact on First Amendment freedoms. State v. Glusman, 651 P.2d 639, 645 (Nev. 1982), citing Hoffman Estates v. Flipside, Hoffman Estates, 102 S.Ct. 1186, 71 L.Ed.2d 262 (1982).

strate a federally protected right to operate a business on premises where licensed gambling is conducted, the authorities cited in their jurisdictional statement do little to support the question presented therein. After quoting from "Board guidelines," which were repealed in 1978, the appellants cite cases in support of their challenge which do not involve licensing standards whatsoever, let alone licensing statutes sharing common terms. A legislative enactment of a state which deals with a matter of such vital and local concern as the regulation of licensed gaming in Nevada should not be so easily undone.

The challenged statute provides, in part, as follows (NRS 463.170(1)-(2)(b)):

> 1. Any person who the commission determines is qualified to receive a license or be found suitable under the provisions of this chapter, having due consideration for the proper protection of the health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada and the declared policy of this state, may be issued a state gaming license or found suitable. The burden of proving his qualification to

receive any license or be found suitable is on the applicant.

2. An application to receive a license or be found suitable shall not be granted unless the commission is satisfied that the applicant is:

(a) A person of good character, honesty and integrity;

(b) A person whose prior activities, criminal record, if any, reputation, habits and associations do not pose a threat to the public interest of this state or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair or illegal practices, methods and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto; . . . .

(Emphasis added.)

Virtually, identical standards were found to lend specificity and clarity in overcoming a vagueness challenge in State v. Rosenthal, 93 Nev. 36, 559 P.2d 830 (1977), appeal dismissed, 434 U.S. 803 (1977). Additionally, the standard of "good character, honesty and integrity" was upheld against a vagueness challenge in In Re Boardwalk Regency Casino License Application, 180 N.J. Super. 324, 434 A.2d 1111 (App. Div. 1981), affirmed, 90 N.J. 361, 447 A.2d 1335

(1982), appeal dismissed sub nom. Perlman v. New Jersey Attorney General, 51 U.S.L.W. 3459 (U.S. December 13, 1982) (No. 82-691). The same result should be reached in the instant case.

The appellees submit that NRS 463.170, standing alone, is not unconstitutionally vague.[5] Even if it were, however, the statutory scheme presented on pages 3-8 herein, considered as a whole, is more than sufficient to guide the State gaming regulators in the area of qualifications for a gaming license or finding of suitability. "These Nevada statutes form a unified legislative plan; particular sections cannot be fully understood without relating them to the entire statutory scheme." United States v. Polizzi, 500 F.2d 856, 875 (9th Cir. 1974),

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5. Indeed, licensing statutes using merely the standard of "good character" or "good moral character" without further amplification have been held not unconstitutionally vague. State ex rel. Pitkanen v. Zittel, 462 P.2d 944 (Sup. Ct. of Washington en banc 1969); Monarski v. Alexandrides, 362 N.Y.S.2d 976 (N.Y. Super. 1974).

cert. denied, 419 U.S. 1420 (1975). It is further appropriate to consider the administrative regulations if the statutes are inadequate. State v. Rosenthal, supra. Taken as whole, these provisions, without question, provide sufficient standards to determine an individual's suitability to do business on premises where licensed gaming is conducted.

CONCLUSION

For the foregoing reasons, appellees respectfully submit that the proceedings appealed from herein lack requisite finality, and that in any event, the federal question on which this case depends is so manifestly unsubstantial as not to require further argument and that, therefore, this appeal should be dismissed, or in the alternative, that the

opinion of the Nevada Supreme Court should be affirmed.

DATED: January 24, 1983.

Respectfully submitted,

BRIAN McKAY
Attorney General of
the State of Nevada

BY: NIKOLAS L. MASTRANGELO
Deputy Attorney General
Gaming Division
Building D, Suite 880
4220 South Maryland Parkway
Las Vegas, Nevada 89158

Counsel for Appellees